UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENNETH LEON CALHOUN,

Defendant.
_____/

Case No. 1:18:CR:198

HON. GORDON J. QUIST

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING MOTION TO SUPPRESS

Defendant, Kenneth Leon Calhoun, has been charged with knowingly and intentionally possessing with intent to distribute 50 grams or more of methamphetamine, 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, and marijuana, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii), and (b)(1)(D). Calhoun moves to suppress evidence seized in connection with the search of a house located at 809 Wallace Avenue in Kalamazoo, Michigan, on August 2, 2018. He argues that suppression is required because the search was not a valid probation search and the officers were required to obtain a search warrant—which they did not have. In particular, Calhoun argues that the search was not a valid probation search because, in reality, it was a subterfuge for a criminal investigation unrelated to legitimate probation concerns.

The Government responds that Calhoun lacks standing to contest the search because he told the officers that he did not live at the Wallace Avenue address. The Government further argues that the search and seizure were valid based on the search condition in Calhoun's probation order and a plethora of circumstances creating reasonable suspicion that Calhoun was engaged in criminal activity that violated the terms of Calhoun's probation.

The Court held an evidentiary hearing on March 15, 2019, during which it received testimony and exhibits pertaining to the search and heard argument from counsel. For the reasons set forth below, Calhoun's motion will be denied.

I. FINDINGS OF FACT

In 2017, Calhoun was convicted of delivery/manufacture of marijuana and sentenced to confinement in jail, followed by a term of probation. One of the conditions in the Order of Probation provided:

> You must submit to a search of your person and property, including but not limited to your vehicle, residence, and computer, without need of a warrant if the field agent has reasonable cause to believe you have items which violate the conditions of your probation.

(Gov't Ex. 1, ¶ 22.) The Order prohibited Calhoun from "posess[ing] any controlled substances or drug paraphernalia," violating "any criminal law of any unit of government," "own[ing], us[ing], or hav[ing] under [his] control or area of control a weapon of any type or any imitation of a weapon," and from changing his residence without first obtaining written permission from the probation field agent. (*Id.*, ¶¶ 1, 10, 18, 19.) Calhoun signed the Order on or about November 29, 2017.

In May 2018, Calhoun told his supervising Probation Officer, Anthony Tyus, that he had moved or was moving to 809 Wallace Avenue. On May 16, 2018, Tyus conducted a home visit at 809 Wallace Avenue and confirmed that Calhoun lived there. Calhoun did not contact Tyus between May 16 and August 2018 to inform any probation officer that he had moved.

In late July 2018, a known confidential informant appeared at the Kalamazoo Department of Public Safety to provide information about Calhoun. The informant told Investigator Benjamin Ulman that Calhoun had been robbed of $20,000 at his Wallace Avenue residence and that Calhoun had paid his brother, James White, to shoot up a house on the east side of Kalamazoo to retaliate for

the robbery.[1] The police had confirmed a few days earlier that, in fact, someone had fired a gun into an east side residence.

On August 1, 2018, the Kalamazoo Department of Public Safety held a crime reduction meeting, a regularly-scheduled meeting at which officers from various law enforcement agencies share and receive information about criminal activity in the Kalamazoo area. Probation Officer Elizabeth Loney was present. During the meeting, Investigator Ulman reported that he had received information about Calhoun having been robbed and Calhoun's possible involvement in a shooting. Investigator Ulman or another officer also indicated that Calhoun was attempting to retaliate against those he suspected were involved in the robbery. Based on this information, Probation Officer Loney searched for Calhoun on her computer and noted that he was subject to a search clause at 809 Wallace Avenue. Probation Officer Loney made arrangements with Sergeant Michael Ferguson, who was present at the meeting, to conduct a compliance check of Calhoun at his registered address. Because manpower was limited on August 1, the compliance check was planned for August 2.

On August 2, Probation Officer Loney and several police officers went to 809 Wallace Avenue in unmarked vehicles.[2] Calhoun was standing outside with some other individuals when the officers arrived. Sergeant Ferguson, Sergeant Brian Cake, and other officers approached Calhoun, identified themselves, and told Calhoun that a probation officer had requested to do a walkthrough of Calhoun's residence. Calhoun said that no one was inside the house and that he would have to call his girlfriend to let him in. Calhoun then put his phone up to his ear and appeared to be calling someone. When Sergeant Cake asked Calhoun where he was staying, Calhoun responded that he was staying at his sister's house on Parsons.

---

[1]Investigator Ulman was not aware at the time that the individual was a confidential informant who had previously provided reliable information, but he subsequently learned that fact.

[2]Probation Officer Tyus did not participate in the compliance check because he was on leave from work.

Sergeant Ferguson noticed a key on a key fob in a Mercedes Benz that was parked in front of the residence with its engine running, and surmised that it might be the key to the house. One of the officers mentioned the key to Calhoun, but Calhoun told the officers that it was not the house key. Sergeant Ferguson obtained permission from Probation Officer Loney to obtain the key from the vehicle. After obtaining the key from the car, Sergeant Ferguson walked up to the door, checked the handle, and, found that the door was not locked. He also found that the key on the key fob from the Mercedes fit the front door. Sergeant Ferguson asked Calhoun to come up to the porch and talk to him and Probation Officer Loney. Before going to the porch Calhoun repeated that no one was home. During this time, Investigator John Killah knocked on the door, opened it, and saw Calhoun's girlfriend, Tefta Diop, with her young child inside. Investigator Killah approached Diop and asked for her consent to search the house. Diop denied consent, but Investigator Killah explained that the officers were going to search the house because they had authority to conduct a probation check.

On the porch, Calhoun repeated to Probation Officer Loney and the other officers that he did not reside in the house, although at some point he did say that he kept shoes and clothing in part of the house. Probation Officer Loney sent a text to Probation Officer Tyus asking whether Calhoun still resided at 809 Wallace Avenue, and Tyus sent a text confirming that Calhoun was still registered at that address.

Inside the house the officers found, among other things, a ziploc bag containing suspected crystal methamphetamine next to a digital scale on a counter top near the kitchen, a gallon size ziploc bag containing marijuana, and two large bags containing suspected crystal methamphetamine. The officers found other drug-related items, including seven bottles of codeine syrup, four rounds of .22 caliber ammunition in a magazine, a security system, and a cell phone. The officers also found adult male clothing and shoes in a bedroom.

Detective Trever Patterson was assigned to cover the back of the residence. As he walked down the driveway, before the search started, he smelled what he believed to be fresh or unburnt marijuana and determined that the odor was coming from inside the house. Officer Chris Raeser, who was also assigned to cover the perimeter of the residence, also smelled processed marijuana as he walked down the driveway. Officer Raeser believed that the odor was coming from underneath a car parked in the driveway.

II. CONCLUSIONS OF LAW[3]

As noted, the Government initially argues that Calhoun lacks standing to assert a Fourth Amendment violation because he told the officers that he did not live or stay at 809 Wallace Avenue. Citing a number cases from outside the Sixth Circuit that applied principles of disclaimer or abandonment to find a lack of standing, the Government argues that by disclaiming 809 Wallace Avenue as his residence, Calhoun acknowledged that he lacked a legitimate privacy interest in the residence. Calhoun responds that, while it is true he told the officers that he did not reside or stay at 809 Wallace, he nonetheless had a reasonable expectation of privacy in the premises because he told the officers that he kept shoes and clothing there and the officers knew that in spite of Calhoun's statements, he actually resided at 809 Wallace Avenue.

To establish standing to assert a Fourth Amendment violation, a defendant must show "that he had a legitimate expectation of privacy in the area searched or items seized." *United States v. Mathis*, 738 F.3d 719, 729 (6th Cir. 2013). Fourth Amendment standing, however, differs from

[3]Generally, "'[t]he proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.'" *United States v. Richards*, 659 F.3d 527, 536 (6th Cir. 2011) (quoting *Rakas v. Illinois*, 439 U.S. 128, 130 n.1, 99 S. Ct. 421 (1978)). However, in the instance of a warrantless search of a defendant's residence, the Government usually bears the burden of establishing that the search was proper under one of the narrow exceptions to the Fourth Amendment. *See Welsh v. Wisconsin*, 466 U.S. 740, 749–50, 104 S. Ct. 2091, 1097 (1984). It is not clear whether the existence of a search clause in a probation order constitutes an exception to the Fourth Amendment, such that the Government bears the burden of proof, or whether the search clause itself fulfills the warrant requirement, placing the burden on the defendant. The Court need not decide the issue because Calhoun's motion fails regardless of which party has the burden.

standing for purposes of Article III jurisdiction. "The concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search; but it should not be confused with Article III standing, which is jurisdictional and must be assessed before reaching the merits." *Byrd v. United States*, __ U.S. __, 138 S. Ct. 1518, 1530 (2018). Accordingly, because Calhoun's standing presents a much closer issue than the merits, the Court will assume that Calhoun has Fourth Amendment standing and proceed to the merits. *See United States v. Dyer*, 580 F.3d 586, 390 (6th Cir. 2009) (assuming Fourth Amendment standing for purposes of the Fourth Amendment challenge and proceeding to the merits).

The United States Supreme Court's decision in *United States v. Knights*, 534 U.S. 112, 122 S. Ct. 587 (2001), provides the pertinent framework for the Court's analysis.[4] In *Knights*, the defendant was subject to a probation condition that required the defendant to submit to a search at any time, with or without a search warrant or reasonable cause, by a probation officer or a sheriff's deputy. Upon learning of evidence implicating the defendant in arson, an investigator from the sheriff's department decided to conduct a search of the defendant's apartment. The investigator found evidence implicating the defendant in the arson, as well as other crimes. The Court framed the issue as "whether a search pursuant to this probation condition, and supported by reasonable suspicion, satisfied the Fourth Amendment." *Id.* at 114, 122 S. Ct. at 589. The Court held that "the warrantless search of Knights, supported by reasonable suspicion and authorized by a condition of probation, was reasonable within the meaning of the Fourth Amendment." *Id.* at 122, 122 S. Ct. at 593. Therefore, under *Knights*, courts are directed to determine whether the searching officer had

[4]The Court finds that *Knights*, rather than *Griffin v. Wisconsin*, 483 U.S. 868, 107 S. Ct. 3164 (1987), applies in the instant circumstances. *See United States v. Tessier*, 814 F.3d 432, 433 n.1 (6th Cir. 2016) (noting that *Griffin* governs where a probation search is made pursuant to a state policy, while *Knights* governs where the search is made pursuant to a condition of probation).

reasonable suspicion by examining the totality of the circumstances, "with the probation search condition being a salient condition." *Id.* at 118, 122 S. Ct. at 591.

Under *Knights*, the search clause allowing Probation Officer Loney to search Calhoun's residence provides the foundation for reasonable suspicion. "Reasonable suspicion exists where the officer can articulate specific, particularized facts that amount to more than a "'hunch'" that criminal activity may be afoot." *United States v. Jeter*, 721 F.3d 746, 751 (6th Cir. 2013) (citing *United States v. Young*, 707 F.3d 598, 604–05 (6th Cir. 2012)). In determining the existence of reasonable suspicion, a court "examines the totality of the facts and circumstances of which the officer was aware . . . ." *United States v. Bridges*, 626 F. App'x 620, 623 (6th Cir. 2015) (citing *United States v. Davis*, 514 F.3d 596, 608 (6th Cir. 2008)).

Here, the officers had a reasonable suspicion even before they arrived at 809 Wallace Avenue. Probation Officer Loney knew that Calhoun had previously been convicted of delivery/manufacture of marijuana, and at the August 1, 2018, crime reduction meeting received information that Calhoun had been robbed of a large amount of cash and that Calhoun had recruited his brother to retaliate against the suspected perpetrators. Moreover, the police had confirmed that a house had been shot up the previous week or so. Based on this information, Probation Officer Loney could reasonably conclude that Calhoun was violating, or had violated, his probation conditions by engaging in drug dealing and/or possessing a firearm.

Even if the officers lacked reasonable suspicion when they arrived, they indisputably had it within seconds of speaking to Calhoun. Calhoun lied to the officers (about easily ascertainable facts) when he stated that he did not live there, that he needed to call his girlfriend to let them inside, and that the key on the key fob in the Mercedes was not the house key. Moreover, as shown on the bodycam video that the Government presented at the evidentiary hearing, Calhoun essentially telegraphed to the officers through his words, actions, and demeanor that there was something in the

house he did not want them to see. In other words, Calhoun's behavior confirmed Probation Officer Loney's suspicions. Finally, an independent, although not necessary, circumstance supporting a reasonable suspicion is that at least one officer detected the smell of marijuana coming from the residence.

Calhoun's primary complaint appears to be that the officers relied on information about criminal activity they received at a crime reduction meeting, and then relied on the search condition to conduct a warrantless search of Calhoun's residence. To the extent Calhoun raises the so-called stalking horse defense, *i.e.*, use of a warrantless probation search to conduct an unrelated criminal investigation, the Sixth Circuit has recognized that *Knights* eliminated any such defense to a probationary search. *See United States v. Payne*, 588 F. App'x 427, 432 (6th Cir. 2014) (noting that "the stalking-horse argument has no application when, as here, a search may be justified under *Knights*' totality-of-the-circumstances standard"). In any event, Calhoun's argument lacks merit because the criminal activity that the officers were investigating was coextensive with Calhoun's violation of his probation conditions.

Accordingly, for the foregoing reasons,

IT IS HEREBY ORDERED that Calhoun's Motion to Suppress (ECF No. 23) is **DENIED**.

Dated: April 5, 2019

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE